Nos. 19-70092, -70244, -70279

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 501, AFL-CIO,

Petitioner, Respondent, and Intervenor,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent and Petitioner,

v.

NP SUNSET LLC, DBA SUNSET STATION HOTEL CASINO,

Intervenor, Petitioner, and Respondent.

On Petition for Review of Decision and Order of National Labor Relations Board
Case No. 367 N.L.R.B. No. 62, Case 28-CA-225263

PETITION FOR REHEARING EN BANC

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FRAP 35(B) STATEMENT AND INTRODUCTION

Petitioner NP Sunset LLC, d/b/a Sunset Station Hotel Casino ("Sunset" or "Employer") respectfully requests rehearing *en banc* because this case presents the following question of exceptional importance: What is the correct legal standard for "guard" status under the National Labor Relations Act: the Board's standard accepted by this Court's panel decision or the D.C. Circuit's and Eighth Circuit's standard with which the panel decision conflicts?

The panel's published decision conflicts with the D.C. Circuit's decision in *Bellagio, LLC v. NLRB*, 863 F.3d 839 (D.C. Cir. 2017), and the Eighth Circuit's decisions in *McDonnell Aircraft Co. v. NLRB*, 827 F.2d 324, 329 (8th Cir. 1987), and *BPS Guard Servs., Inc. v. NLRB*, 942 F.2d 519 (8th Cir. 1991). Section 9(b)(3) of the National Labor Relations Act ("NLRA" or "Act") defines a "guard" as an employee who "enforce[s] against employees and other persons rules to protect property of the employer . . . ." 29 U.S.C. § 159(b)(3). The legal standard that the National Labor Relations Board ("NLRB" or "Board") applied in this case contradicts the plain language of the statute. Under the NLRB's standard, only "traditional" guard duties (such as physically restraining guests and carrying weapons) will establish "guard" status.

The panel decision appears to accept the NLRB's standard as a correct statement of the law. The decision thus creates a conflict with the D.C. Circuit and

Eighth Circuit. Those circuits follow the plain language of the statute: an employee is a "guard" if the employee enforces against employees and other persons rules to protect the employer's property. These conflicting legal standards lead to different outcomes for employees who—like the Slot Technicians here—are not traditional security guards, but nonetheless play a unique and critical role in enforcing rules to protect the Employer's property. This Court should eliminate this circuit split *en banc* by (1) expressly rejecting the NLRB's incorrect legal standard, (2) aligning this Court's law with the D.C. Circuit's and Eighth Circuit's correct legal standard, and (3) either reversing the NLRB's decision outright or vacating and remanding for the agency to apply the correct legal standard.

The circuit split created by the panel's decision concerns a matter of widespread legal and practical importance to labor-management relations. The legislative history of the NLRA, as well as Board and appellate case law, are replete with discussions of the dangers of permitting statutory "guards" and non-guards to be represented by the same union. Conversely, as discussed by the Court here, an overbroad understanding of "guard" status could result in denying large swaths of employees their choice of bargaining representative. The legal standard applied by the D.C. and Eighth Circuits appropriately balances these important legislative purposes. The NLRB's decision that the panel affirmed here, by

contrast, does not. Either way, the exceptional importance of the issue to federal labor law, employees, and employers warrants *en banc* review.

Rehearing *en banc* should be granted to resolve the circuit split created by the panel's decision on this issue of widespread national importance. *See* Fed. R. App. P. 35(b)(1)(B); 9th Cir. Rule 35-1. At a minimum, the petition should be held in abeyance pending the D.C. Circuit's decisions on the same issue (Are Slot Technicians guards under the NLRA?) in a series of related cases (currently scheduled for oral argument on May 14, 2020), which may shed further light on the existence and depth of the circuit split.

BACKGROUND

Section 9(b)(3) of the NLRA defines a guard as an employee who is employed to "enforce against employees and other persons rules to protect property of the employer . . . ." 29 U.S.C. § 159(b)(3). Under the Act, guards may not be represented by a union that also represents non-guard employees. *Id.* The underlying dispute in this case is whether the Sunset Slot Technicians are guards under the Act, and therefore ineligible for representation by the International Union of Operating Engineers Local 501, AFL-CIO ("Union"). (Opinion of the Court in *Local IUOE 501 v. NLRB*, Nos. 18-71124, - 72079, -72121 ["Op."] at 5.[1])

[1] Citations to the panel opinion are to the published opinion issued on the same day in a related case involving a different subsidiary ("GVR") of the same parent company as the employer (Sunset) here. In its unpublished decision here, the

On June 29, 2018, the Union petitioned to represent the Slot Technicians at Sunset's facility. (SER 33.) Sunset argued the petition must be dismissed because the Slot Technicians are "guards" within the meaning of the Act, and the Union admittedly accepts non-guards to membership. (SER 34; *see also* SER 35-41.)

During the course of the administrative hearing, Sunset presented extensive and undisputed evidence that the Slot Technicians "enforce against employees and other persons rules to protect property [*i.e.*, assets] of the employer." The crux of Sunset's case is that the Slot Technicians play a unique and critical role in protecting the employer from theft and fraud, including by: (a) investigating claims of game malfunctions, lost credits, incorrect payments, and fraudulent jackpots; (b) protecting against physical or software vulnerabilities in the machines; (c) assisting the Nevada Gaming Commission (a law enforcement agency) in investigating gaming irregularities and forming probable cause to effect an arrest; and (d) investigating mistakes or intentional misconduct by other Slot Technicians. (SER 14, 16-21, 48-71, 74-77, 79, 82-83; *see also* SER 15, 22-29, 31-32.) In addition to these unique duties that constitute the principal basis for the "guard" status of the

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Court explained: "As we have concluded in a case argued together with this one, the Board did not err in determining that the casino slot technicians are not 'guards' under 29 U.S.C. § 159(b)(3). *Int'l Union of Operating Eng'rs Local 501 v. NLRB*, [949] F.3d [477], No. 18-71124 (9th Cir. [February 7], 2020)." Sunset's petition therefore treats this case as having been decided by this Court's published opinion in No. 18-71124. The employer GVR in No. 18-71124 has filed a substantively identical petition for rehearing *en banc* from that decision.

Slot Technicians, Sunset also presented evidence that the Slot Technicians perform duties common to many other hotel-casino employees, such as enforcing the Employer's rules against underage drinking and gaming. (SER 78-82.)

The Board—relying on an analytical approach that both the D.C. and Eighth Circuits had already rejected—completely discounted the unique duties performed by the Slot Technicians in evaluating "guard" status because they are not the type of "traditional" security guard duties (such as physically restraining guests or carrying weapons) identified by the Board in *Boeing Co.*, 328 N.L.R.B. 128, 130 (1999). (SER 8.) After brushing aside the unique duties, the Board then held that the common duties (which are more akin to the "traditional" guard functions in *Boeing*) were no more than a "minor and incidental" part of the Slot Technicians' duties and therefore insufficient to establish "guard" status. (SER 9.)

After the Union won the subsequent election, Sunset sought appellate review of the Board's certification of the Union.[2] As discussed in more detail below, this Court granted enforcement of the Board's Order essentially for the reasons advanced by the Board. By accepting the Board's use of the legal standard

[2] Because there is no direct appeal from an NLRB representation case proceeding, Sunset was required to refuse to bargain with the Union, draw an unfair labor practice charge, and then appeal the resulting Board order on the grounds that the underlying certification of the Union was improper.

articulated in *Boeing*, the panel decision created a conflict with decisions of the D.C. and Eighth Circuits that employ a sharply different legal standard.

REASONS FOR GRANTING REHEARING *EN BANC*

I. The Panel's Decision Conflicts with Decisions of the D.C. Circuit and the Eighth Circuit on the Correct Legal Standard for "Guard" Status

With this Court's decision, there are now two conflicting lines of federal appellate cases as to the appropriate legal standard for determining whether an employee is a "guard" within the meaning of the Act. The legal standard that the D.C. and Eighth Circuits have embraced would yield a different result in this case—or at least require a remand to the Board to apply the correct legal standard in the first instance. *En banc* review is therefore warranted.

A. The Board Has Taken an Improperly Narrow Approach to "Guard" Status

The Act defines a "guard" as an employee who "enforce[s] against employees and other persons rules to protect property of the employer . . . ." 29 U.S.C. § 159(b)(3). However, in a line of cases culminating in its *Boeing* decision, the Board adopted a restrictive interpretation of the Act that essentially limits the definition of "guard" to "security or police-type" rule enforcers. *See McDonnell*, 827 F.2d at 329. Specifically, in *Boeing*, the Board concluded that "guard" responsibilities are limited to:

> traditional police and plant security functions, such as the enforcement of rules directed at other employees; the possession of authority to compel compliance with those rules; training in security procedures;

> weapons training and possession; participation in security rounds or patrols; the monitor and control of access to the employer's premises; and wearing guard-type uniforms or displaying other indicia of guard status.

Boeing, 328 N.L.R.B. at 130. Likewise, under the Board's approach, it is not enough that a putative guard enforce rules to protect the employer's property; the guard must specifically enforce rules in a so-called "security context." (Board Brief at 39.) The net result of the Board's restrictive approach is that employees who indisputably enforce rules to protect their employer's property—like the surveillance technicians in *Bellagio* and the Slot Technicians in this case—but who do not perform the "traditional" police-like duties identified in *Boeing* are deemed not to be guards under the Act.

B. The D.C. and Eighth Circuits Rejected the Board's Approach

Before this Court's decision, federal appellate precedent had uniformly rejected the Board's overly narrow approach to guard status. Under the D.C. Circuit's and Eighth Circuit's approach, the Act means what it says: an employee is a guard if the employee enforces against employees and other persons rules to protect the employer's property. There is no requirement that the employee perform any of the "traditional" guard duties identified by the Board in *Boeing*, nor any limitation on the type of rules enforced beyond what the statute requires.

As the Eighth Circuit held in *McDonnell*, "the Board's restriction of Section 9(b)(3) application to the enforcement of security rules only cannot be reconciled

with the plain language of the statute." 827 F.2d at 329; *see also BPS*, 942 F.2d at 523-26. Likewise, in his dissent in *Boeing*, Board Member Brame correctly pointed out that the Board's approach was inconsistent with the plain text of the statute, earlier Board precedent, and the Eighth Circuit's decisions in *McDonnell* and *BPS*. *Boeing*, 328 N.L.R.B. at 133-34 (Brame, dissenting) ("The text of the statute does not distinguish among 'rules,' differentiating enforcement of security rules from [other rules]," and the "Board and reviewing courts have consistently declined to restrict the application of Section 9(b)(3) to 'plant security guards.'").

More recently, in *Bellagio*, the D.C. Circuit again rejected the Board's narrow construction of "guard." *Bellagio*, 863 F.3d at 848-51 (relying on the plain language of the statute and faulting the Board for "assign[ing] too much weight to the fact that the techs do not perform traditional guard functions"); *see also BPS*, 942 F.2d at 522-26; *McDonnell*, 827 F.2d at 329. En route to concluding that *Bellagio*'s surveillance technicians were statutory guards, the D.C. Circuit specifically noted that:

> Unlike a security officer, a tech does not carry a weapon or handcuffs; does not patrol the resort for misconduct; does not restrain an unruly guest; and does not physically confront a cheater or a thief. Unlike an officer or surveillance operator, a tech does not watch live feeds or stored footage for wrongdoing and does not document it. And when a tech participates in a special operation [*i.e.*, a "sting" operation], he does not confront or interview the targeted employee.

Bellagio, 839 F.3d at 845. In other words, the *Bellagio* technicians performed none of the "traditional police and plant security functions" identified by the Board in *Boeing*. *See id.* at 851.

After conducting an extensive analysis of the Act's plain text, its legislative history, and NLRB and appellate precedent, the D.C. Circuit had little trouble concluding that the surveillance technicians were statutory "guards." It noted that while the Act requires that a guard "enforce" rules, both Board and federal appellate precedent have long held that it is sufficient that the putative guard perform an "essential step" in the enforcement of the rules; the guard need not personally confront individuals or compel compliance. *Bellagio,* 839 F.3d at 851 (citing, among other authorities, Black's Law Dictionary 645 (10th Ed. 2014); *McDonnell*, 827 F.2d at 327; *Wright Mem'l Hosp.*, 255 N.L.R.B. 1319 (1980); *MGM Grand Hotel*, 274 N.L.R.B. 139 (1985)). Above all, "Congressional intent, discernible from plain language, supports the broad interpretation [of the term 'enforce'] in *Wright Memorial Hospital* and *MGM Grand Hotel*." *Id.* at 849. Accordingly, despite acknowledging that the surveillance technicians did not perform the traditional guard duties in *Boeing*, the D.C. Circuit correctly concluded that the essential role the surveillance technicians played in enforcing rules to protect the assets of the employer was sufficient to make them "guards" under the Act. *Id.* at 849-52.

C. This Court's Panel Decision Creates a Circuit Split

Here, this Court was squarely confronted with the issue of which legal standard it should apply. Should it accept the Board's standard, under which only police-like employees who perform "traditional" guard duties and enforce "security" rules are deemed "guards"? Or should it adopt the approach of the D.C. and Eighth Circuits, under which an employee is a "guard" if he or she enforces against employees and other persons rules to protect the employer's property?

Although the panel opinion does not expressly state which standard it was adopting, it appears to have accepted the Board's analytical approach. The Court recognized that "the Board argues that the casino's slot technicians do not perform any of the traditional guard responsibilities identified in *Boeing*" (Op. at 9) and then "agree[d] with the Board's determination that the casino's slot technicians are not guards under the statute" (Op. at 11). Moreover, the Court stated: "GVR argues that the slot technicians are guards because they 'enforce GVR's rules and policies against GVR's guests and other employees in order to protect GVR's property and assets.' This distended interpretation of guard status would swallow the definition outright." (Op. at 13.) But this was not just the Employer's interpretation here; it is the approach that the D.C. and Eighth Circuits had adopted in their own precedential decisions. While the panel opinion also sought to distinguish *Bellagio* on its facts (Op. at 11-12), it never embraced the D.C. and

Eighth Circuits' legal standard as its own—just as it never disavowed or corrected the Board's legal standard in *Boeing*.

This Court's acceptance of the Board's *Boeing* approach is incompatible with the D.C. Circuit's and Eighth Circuit's rejection of the Board's overly narrow conception of "guard" status. A review of the panel opinion itself reveals how the outcome of this case would differ under those circuits' approach. This Court explained: "GVR further contends that 'a core function of the slot technician's duties is to enforce rules against casino guests and other employees to protect GVR's property and assets,' including by 'verifying jackpots against fraudulent payouts.' It alleges that the slot technicians are trained and instructed to combat the true dangers facing casinos 'in the modern context,' including 'unscrupulous individuals who try to take advantage of all aspects of the employer's slot machine operation, ranging from the initial bill validation, to fraudulent payouts and tampering, to claims of lost credits, to fraudulent "EZ-Pay" tickets.'" (Op. at 10.) The panel opinion does not demonstrate that these activities are not essential steps in "enforc[ing] GVR's rules and policies against GVR's guests and other employees in order to protect GVR's property and assets." (Op. at 13.) Rather, it rejects Sunset's approach—and by necessary implication, the D.C. and Eighth Circuit's legal standard—as a "distended interpretation of guard status [that] would swallow the definition outright." (Op. at 13.) The panel decision therefore

ultimately rests on a disagreement with the legal standard adopted by other circuits and advocated by Sunset here, and not merely on the asserted factual distinctions with *Bellagio*.

Whether or not one agrees with the panel's ultimate conclusion, the Court's acceptance of the Board's analytical approach—whereby only employees who perform "traditional" guard responsibilities and enforce rules in a "security context" may be deemed "guards"—places it squarely in conflict with the decisions of the Eighth Circuit in *McDonnell* and *BPS* and the D.C. Circuit in *Bellagio*. This Court should therefore take up the issue *en banc*.

II. The Circuit Split Created By the Panel's Decision Concerns an Issue of Widespread National Importance

The circuit split created by the panel's decision is not just of academic interest. Rather, it is of widespread legal and practical importance to labor-management relations throughout the country.

Under the Board's and panel's approach, employers will be narrowly protected against potential conflicts of interest with respect to traditional plant security guards, but not in other contexts. As explained by the Eighth Circuit in *McDonnell*, "the common theme which runs throughout Board and reviewing court decisions is the legislative policy of avoiding the *potential* of divided loyalty in *any* employee who is vested with the authority to enforce rules and regulations for the protection of company property." 827 F.2d at 326 (emphasis added). Thus, while

Congress may have been concerned primarily about traditional "plant guards" and strike/picket contexts when enacting Section 9(b)(3), "nothing in the statutory language suggests the Congress was blind to the potential for conflict inherent in other employment contexts." *Bellagio*, 863 F.3d at 849.

As discussed above, this case is a perfect example of the dangers posed by the Board's and panel's narrow approach to defining "guards." It is of course true that in the event of strikes or picketing, the Slot Technicians will not be patrolling the line with guns and handcuffs. But the *risk* of divided loyalties is just as present here, if not more so. *See id.* at 852 ("Section 9(b)(3) [of the Act] is meant to minimize the *danger* of divided loyalty." (emphasis added).) In the event a player (who may be an employee of Sunset, or another Union member who works at a different hotel-casino) is accused of cheating and fraud, the player faces loss of his or her job, gaming registration, and potential arrest and prosecution. An employer has good cause to insist that its employee charged with investigating the allegations be free from any direct or indirect pressure to falsify his or her findings or otherwise exonerate a guilty player. Likewise, an employer may justifiably demand that an employee who can cause severe economic damage to the company not be placed in a position where he or she could be pressured to cause such harm to create economic leverage over the employer in support of union bargaining

goals. An overly narrow construction of the term "guard" thus risks stripping employers of the protection Congress intended by enacting Section 9(b)(3).

The converse is also true. As this Court indicated in its decision, adopting an overly broad construction of the term "guard" risks depriving large swaths of employees of the right to choose their preferred exclusive bargaining representative. (Op. at 13.) While Sunset believes that the Board's "minor and incidental" standard (which Sunset does not dispute) adequately protects against this slippery slope, the panel's concerns nonetheless illustrate the broad national importance of this issue. Consequently, properly defining a "guard" within the meaning of the Act is of great importance to both employers and employees throughout the country.

CONCLUSION

The panel's decision creates a circuit split on an issue of major importance to labor-management relations throughout the country. *En banc* rehearing should be granted to address this issue. At a minimum, the petition should be held in abeyance pending the D.C. Circuit's decisions in a series of related cases (currently scheduled for oral argument on May 14, 2020), which may shed further light on the existence and severity of the circuit split.

Dated: March 23, 2020

Respectfully submitted,

/s/ Stanley J. Panikowski

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 11. Certificate of Compliance for Petitions for Rehearing or Answers

Instructions for this form: http://www.ca9.uscourts.gov/forms/form11instructions.pdf

9th Cir. Case Number(s) 19-70092, -70244, -70279

I am the attorney or self-represented party.

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/answer to petition is (*select one*):

◉ Prepared in a format, typeface, and type style that complies with Fed. R. App. P. 32(a)(4)-(6) and **contains the following number of words**: 3,377.

(Petitions and answers must not exceed 4,200 words)

OR

○ In compliance with Fed. R. App. P. 32(a)(4)-(6) and does not exceed 15 pages.

Signature s/Stanley J. Panikowski **Date** Mar 23, 2020

*(use "*s/[typed name]*" to sign electronically-filed documents)*

CERTIFICATE OF SERVICE

I certify that I electronically filed this PETITION FOR REHEARING EN BANC with the United States Court of Appeals for the Ninth Circuit via the Court's CM/ECF system on March 23, 2020, and that service will be made on counsel of record for all parties to this case through the Court's CM/ECF system.

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ADDENDUM

FILED

FEB 7 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL NO. 501, AFL-CIO, Petitioner, v. NATIONAL LABOR RELATIONS BOARD, Respondent, NP SUNSET LLC, DBA Sunset Station Hotel Casino, Intervenor.	No. 19-70092 NLRB No. 28-CA-225263 MEMORANDUM*
NP SUNSET LLC, DBA Sunset Station Hotel Casino, Petitioner, v.	No. 19-70244 NLRB No. 28-CA-225263

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 501, AFL-CIO,

Intervenor.

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

NP SUNSET LLC,
DBA Sunset Station Hotel Casino,

Respondent,

INTERNATIONAL UNION OF OPERATING ENGINEER LOCAL 501, AFL-CIO,

Intervenor.

No. 19-70279

NLRB No. 28-CA-225263

On Petition for Review of an Order of the
National Labor Relations Board

Argued and Submitted December 3, 2019
San Francisco, California

Before: SILER,** CLIFTON, and BYBEE, Circuit Judges.

The International Union of Operating Engineers Local 501, AFL- CIO ("Union") and NP Sunset LLC, DBA Sunset Station Hotel Casino ("Sunset") each petition for review of a January 7, 2019 Order by the National Labor Relations Board ("Board"). The Board has also filed a cross-application to enforce this Order against Sunset. We deny both petitions for review and grant the Board's cross-application to enforce its Order.

As we have concluded in a case argued together with this one, the Board did not err in determining that the casino slot technicians are not "guards" under 29 U.S.C. § 159(b)(3). *Int'l Union of Operating Eng'rs Local 501 v. NLRB*, ___ F.3d ___, No. 18-71124 (9th Cir. _____, 2020).

In addition, the Board did not abuse its discretion in declining to grant the Union's request for enhanced remedies. *See United Steel Workers of Am. AFL-CIO-CLC v. NLRB*, 482 F.3d 1112, 1116 (9th Cir. 2007). The Board also did not

** The Honorable Eugene E. Siler, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

err in failing to provide an explanation for its decision to issue standard remedies. *See id.* at 1118 (9th Cir. 2007) ("[T]he Board's decision to order an unextraordinary remedy does not merit an extraordinary explanation.").

Petitions for Review DENIED; Cross-Application to Enforce GRANTED.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

INTERNATIONAL UNION OF OPERATING ENGINEER LOCAL 501, AFL-CIO, *Petitioner*, v. NATIONAL LABOR RELATIONS BOARD, *Respondent*, STATION GVR ACQUISITION, LLC, d/b/a Green Valley Ranch Resort Spa Casino, *Respondent-Intervenor*.	No. 18-71124 NLRB No. 28-CA-214925

STATION GVR ACQUISITION, LLC, DBA Green Valley Ranch Resort Spa Casino, *Petitioner*, v. NATIONAL LABOR RELATIONS BOARD, *Respondent.*	No. 18-72079 NLRB No. 28-CA-214925
NATIONAL LABOR RELATIONS BOARD, *Petitioner*, v. STATION GVR ACQUISITION, LLC, DBA Green Valley Ranch Resort Spa Casino, *Respondent.*	No. 18-72121 NLRB No. 28-CA-214925 OPINION

On Petition for Review of an Order of the
National Labor Relations Board

Argued and Submitted December 3, 2019
San Francisco, California

Filed February 7, 2020

Before: Eugene E. Siler,* Richard R. Clifton, and Jay S. Bybee, Circuit Judges.

Opinion by Judge Clifton

SUMMARY**

Labor Law

The panel denied Station GVR Acquisition, LLC, and International Union of Operating Engineers Local 501, AFL-CIO's petitions for review, and granted the National Labor Relations Board's cross-application for enforcement of the Board's order holding that slot technicians were not "guards" under section 9(b)(3) of the National Labor Relations Act (the "Act").

Station GVR owned and operated a hotel and casino in Henderson, Nevada, and it employed slot technicians whose primary responsibilities included installing, repairing, and maintaining gaming machines. The Union filed a petition with the Board to represent GVR's slot technicians. The Board certified Local 501 as the slot technicians' bargaining representative, concluding that the slot technicians were not guards. When GVR refused to recognize and bargain with the Union, the Board found that GVR engaged in unfair labor

* The Honorable Eugene E. Siler, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

practices within the meaning of the Act and ordered various remedies.

The Act prohibits a union from representing a guard unit if it also represents non-guard employees. Because it was undisputed that the Union represented non-guard employees at the casino, the panel's inquiry focused on whether a slot technician was employed as a guard.

The panel agreed with the Board's determination that the casino's slot technicians were not guards under the statute. The panel held that the slot technicians' duties differed in fundamental respects from those of the surveillance technicians in *Bellagio, LLC v. NLRB*, 863 F.3d 839 (D.C. Cir. 2017). The panel rejected GVR's argument that the slot technicians were guards because they enforced GVR's rules and policies against GVR's guests and other employees.

The Union sought review of the Board's decision not to impose an affirmative remedy ordering GVR to provide certain information that it had previously requested. The panel held that the Union did not have standing to bring this petition because the Board granted it all of the relief that it had specifically sought in the charge and complaint, and therefore, the Union was not a "person aggrieved" within the meaning of 29 U.S.C. § 160(f).

COUNSEL

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Stanley J. Panikowski (argued), San Diego, California, for Respondent-Intervenor, Petitioner, and Respondent Station GVR Acquisition, LLC.

Heather S. Beard (argued), Washington, D.C., for Respondent and Petitioner National Labor Relations Board.

OPINION

CLIFTON, Circuit Judge:

Station GVR Acquisition, LLC ("GVR") owns and operates a hotel and casino in Henderson, Nevada, known as Green Valley Ranch Resort. The casino has approximately 2300 gaming machines, including video slot machines, video reel machines, machines that use a combination of both reel and video components, and strictly reel machines. Many of these machines rely on modern electronics and computer-based technology. The casino employs thirteen slot technicians whose primary responsibilities include installing, repairing, and maintaining the gaming machines.

This case raises the question of whether the slot technicians are "guards" under section 9(b)(3) of the National Labor Relations Act (the "Act"), 29 U.S.C. § 159(b)(3). Under the Act, the National Labor Relations Board ("NLRB" or the "Board") cannot certify a union to represent "guards," as that term is used in the statute, if that union also represents non-guard employees.[1]

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[1] Section 9(b)(3), 29 U.S.C. § 159(b)(3), states that:

> [T]he Board shall not . . . (3) decide that any unit is

There are three separate petitions before us. *First*, GVR petitions for review of the NLRB's decision certifying the International Union of Operating Engineers Local 501, AFL-CIO ("Local 501" or the "Union") as the slot technicians' bargaining representative, based on the NLRB's determination that the slot technicians are not guards. *Second*, the NLRB seeks enforcement of its order requiring GVR to bargain with the Union. *Third*, the Union petitions for review of the NLRB's decision not to order an affirmative remedy requiring GVR to provide the Union with certain information that it had requested in a letter to the company. We agree with the NLRB that the slot technicians are not guards under the statute. We therefore deny GVR's petition and grant the cross-application of the NLRB to enforce its order. We also deny the Union's petition.

I. Background

In August 2017, the Union filed a petition with the Board to represent GVR's slot technicians. The slot technicians thereafter voted unanimously in favor of Local 501 serving as their bargaining representative. GVR filed objections to the representation. It argued that the slot technicians were

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> appropriate for [collective bargaining] if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

guards, and that because Local 501 represented other non-guard employees at the casino, it could not serve as the bargaining representative of the slot technicians. The NLRB Regional Director overruled GVR's objections and certified Local 501 as the slot technicians' bargaining representative, concluding that the slot technicians were not guards. The NLRB later denied GVR's request for review of that determination.

Shortly after the Union was certified, it sent a letter to GVR including a demand for bargaining and a request to be provided with certain categories of information. GVR responded that it would not commence collective bargaining or produce information, and has since refused to recognize and bargain with the Union. The NLRB thereafter found that GVR engaged in unfair labor practices within the meaning of the Act and ordered various remedies.

II. Discussion

"This court upholds decisions of the NLRB 'if its findings of fact are supported by substantial evidence and if the Board correctly applied the law,' and defers to any 'reasonably defensible' interpretation of [the Act]." *Retlaw Broad. Co. v. NLRB*, 53 F.3d 1002, 1005 (9th Cir. 1995) (quoting *NLRB v. Gen. Truck Drivers, Local No. 315*, 20 F.3d 1017, 1021 (9th Cir.), *cert. denied*, 513 U.S. 946 (1994)).

A. Guards Under the Statute

The Act's prohibition on a union representing a guard unit if it also represents non-guard employees is intended "to minimize the danger of divided loyalty that arises when a guard is called upon to enforce the rules of his employer

against a fellow union member." *Drivers, Chauffeurs, Warehousemen & Helpers, Local 71 v. NLRB*, 553 F.2d 1368, 1373 (D.C. Cir. 1977); *see also Wells Fargo Alarm Servs. v. NLRB*, 533 F.2d 121, 125 (3d Cir. 1976) ("[T]he Board's inquiry must focus on whether the potential conflict in loyalties which concerned Congress is present.").

> In enacting this section of the Act, Congress sought to prevent the conflict of interests that might arise among an employer's guard employees when, during a strike by a unit of nonguard employees represented by the same union that represents the employer's guards, the guards are called upon to enforce the employer's security rules against their striking colleagues.

Boeing Co., 328 N.L.R.B. 128, 130 (1999).

Because it is undisputed that the Union represents non-guard employees at the casino, our inquiry focuses on whether a slot technician is an "individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises." 29 U.S.C. § 159(b)(3); *see Bellagio, LLC v. NLRB*, 863 F.3d 839, 847–48 (D.C. Cir. 2017).

B. Slot Technicians

In defending its conclusion that the slot technicians are not guards, the Board points to its decision in *Boeing Co*., where it described the customary responsibilities of guards:

> Guard responsibilities include those typically associated with traditional police and plant security functions, such as the enforcement of rules directed at other employees; the possession of authority to compel compliance with those rules; training in security procedures; weapons training and possession; participation in security rounds or patrols; the monitor and control of access to the employer's premises; and wearing guard-type uniforms or displaying other indicia of guard status.

328 N.L.R.B. at 130. Recognizing that employees might have different responsibilities, some related to security and some not, the Board concluded that employees are guards under the Act "if they are charged with guard responsibilities that are not a minor or incidental part of their overall responsibilities." *Id.*

In the context of this case, the Board argues that the casino's slot technicians do not perform any of the traditional guard responsibilities identified in *Boeing*. On the contrary, it characterizes the slot technicians, as their title implies, as technicians who install, maintain, and repair the slot machines, and contend that these duties differ fundamentally from those of guards.

GVR argues that the Board takes too narrow a view of what constitutes a guard. It asserts that *Boeing*'s holding that only persons who perform traditional police-like functions are guards is "flawed" and inconsistent with the plain language of the statute, as well as other Board and appellate-court precedent. GVR further contends that "a core function of the

slot technician's duties is to enforce rules against casino guests and other employees to protect GVR's property and assets," including by "verifying jackpots against fraudulent payouts." It alleges that the slot technicians are trained and instructed to combat the true dangers facing casinos "in the modern context," including "unscrupulous individuals who try to take advantage of all aspects of the employer's slot machine operation, ranging from the initial bill validation, to fraudulent payouts and tampering, to claims of lost credits, to fraudulent 'EZ-Pay' tickets."

GVR relies principally on the decision of the D.C. Circuit in *Bellagio*, where the court held that the Board improperly determined that a casino's surveillance technicians were not guards. 863 F.3d at 852. The *Bellagio* court described several aspects of those employees' responsibilities, including that they: (1) design, install, and maintain the surveillance department's gaming-floor camera system; (2) "oversee the server room and are solely responsible for the elaborate computer system that manages basically every aspect of [] digital surveillance, including not only the surveillance department's cameras but the security department's as well"; (3) "train the operators and officers on how to use the computers, change camera views and archive video files"; and (4) "maintain each casino's electronic access system." *Id.* at 842–43 (internal quotation marks and citations omitted). The court noted also that, "perhaps most importantly for our purpose, techs often participate in targeted investigations of fellow employees suspected of wrongdoing." *Id.* at 844.

Bellagio concluded that the casino surveillance technicians were guards under the statute because the evidence "[t]aken as a whole . . . demonstrates that the techs

perform an essential step in the [] enforcement of rules to protect the casinos' property and patrons, including enforcement against their fellow employees." *Id.* at 849 (internal quotation marks omitted). It noted that the Board's contrary determination overlooked, among other things: (1) "that the surveillance operators and security officers in the monitor rooms cannot properly do their jobs without the techs"; (2) the context of "ultramodern luxury casinos" with sophisticated networks "protect[ing] high-end jewelry, priceless art, stockpiles of cash and the personal safety of revelrous guests who are not always vigilant regarding their own wellbeing"; (3) that "techs can control what surveillance operators and security officers see in the monitor rooms"; and (4) the "crucial fact that the techs help enforce rules against their *coworkers*, most obviously during special operations." *Id.* at 850–52 (emphasis in original).

We agree with the Board's determination that the casino's slot technicians are not guards under the statute. Their duties differ in fundamental respects from those of the surveillance technicians in *Bellagio*. There, the surveillance technicians were responsible for the system that managed "basically every aspect of [] digital surveillance," including the cameras used by both the security and surveillance departments. *Id.* at 843. Moreover, the surveillance technicians "control[led] access to all sensitive areas of each casino and ha[d] access to all areas themselves; . . . maintain[ed] alarm systems for the most valuable property in each casino; and . . . help[ed] spy on fellow employees suspected of misconduct." *Id.* at 849. Indeed, with respect to helping enforce rules against coworkers, the court found that "[t]he tech's duties in a special operation squarely implicate section 9(b)(3)'s aim of minimizing the danger of divided loyalty that arises when a guard is called upon to enforce the rules of his employer

against a fellow union member." *Id.* at 852 (internal quotation marks omitted).

By contrast, the slot technicians are not responsible for any systems relied upon by the surveillance and security departments to carry out their core functions. Slot technicians' interactions with those departments are limited to verifying that machines are operating properly and helping to determine the validity of potentially fraudulent claims of faulty payouts on gaming machines. Unlike the surveillance technicians who controlled the access—and themselves had access—to all sensitive areas of the casino, slot technicians are not permitted to enter the surveillance room without permission and do not control access to sensitive spaces in the casino. Rather, the slot technicians spend 90% of their time on the gaming floor, primarily installing, maintaining, and repairing the machines.

Most importantly, while the surveillance technicians in *Bellagio* helped "spy on fellow employees suspected of misconduct," *id.* at 849, and engaged in special operations against other employees, which the court found "squarely implicat[ed]" section 9(b)(3)'s aim of minimizing the danger of divided loyalty, *id.* at 852, slot technicians do not engage in sting operations to detect malfeasance against employees or customers. Indeed, they have no involvement in the investigation of other employees except to the extent that an inspection of a gaming machine might be required. They likewise have no obligation to report employee misconduct beyond that of other employees. The animating purpose of minimizing divided loyalty between guards and non-guard employees is not implicated by this representation.

GVR argues that the slot technicians are guards because they "enforce GVR's rules and policies against GVR's guests and other employees in order to protect GVR's property and assets." This distended interpretation of guard status would swallow the definition outright. For example, GVR contends that the slot technicians "[e]nforce GVR's rules and policies against underage gaming and underage drinking, which protects GVR against both legal liability and the potential loss of its gaming license," and also enforce "GVR's anti-money laundering rules." But the Board found that all of the employees who work on the gaming floor, including slot technicians, are required to be on the lookout for malfeasance such as underage drinking and gambling and money laundering. These employees report any prohibited activity to security personnel. Critically, the duties of the slot technicians to detect and report malfeasance at the casino extends no further than other employees who work on the gaming floor.

Under GVR's proffered interpretation of guard status, we struggle to think of any casino employee who would not fit the bill. Bartenders surely enforce GVR's rules against underage drinking when they check a patron's ID before serving alcohol. Likewise, table dealers enforce rules to protect the property of the casino when they exchange chips only for the amount of cash received from a prospective player and look to see that players are not pocketing extra chips. Just as the slot technicians' duties include reporting prohibited activity to security, the bartenders and dealers are to do the same if they detect a patron presenting fake identification or stealing chips. We decline to adopt an interpretation of the Act that would characterize virtually all employees working on the casino floor as guards.

C. The Union's Petition

Finally, the Union seeks review of the Board's decision not to impose an affirmative remedy ordering GVR to provide certain information that it had previously requested in a letter to the company. The Union does not deny that the Board granted it all of the relief that it had specifically sought in the charge form and complaint. It therefore does not have standing to bring this petition, as it is not a "person aggrieved" within the meaning of 29 U.S.C. § 160(f).[2]

III. Conclusion

The Board reasonably determined that the slot technicians are not guards under section 9(b)(3) of the Act. The Board likewise did not err in failing to provide the Union with an affirmative remedy that it had not sought. The petition for review filed by GVR is **DENIED**, the petition for review filed by the Union is also **DENIED** and the Board's cross-application for enforcement of its order against GVR is **GRANTED**.

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[2] 29 U.S.C. § 160(f) provides, in relevant part:

> Any person aggrieved by a final order of the Board granting or denying in whole or in part *the relief sought* may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged . . . (emphasis added).